IN THE SUPRĖME COURT OF FLORIDA

PAUL C. HILDWIN, Case No. SC09-1417
PETITIONER,

v.

STATE OF FLORIDA,
RESPONDENT

PETITION SEEKING TO INVOKE THIS COURT'S ALL-WRITS JURISDICTION

Petitioner Paul C. Hildwin, by and through undersigned co-counsel, hereby files this petition for relief seeking to invoke this Court's all-writs jurisdiction. Specifically, Petitioner seeks an order directing the State of Florida to conduct a one-time comparison of an unidentified male DNA profile -- found in multiple locations at the scene of the crime for which he was convicted -- against the more than eight million convicted-offender profiles contained in the national and state DNA databanks, for the purpose of determining whether one of those offenders is the actual perpetrator of the crime for which Petitioner has been sentenced to death.

I. PRELIMINARY STATEMENT

Five years ago, Petitioner came before this Court seeking relief from his 1986 conviction and death sentence, on the basis of newly-discovered DNA test results that revealed he was not

the source of critical biological material offered against him at trial. The new evidence at the heart of that petition for relief (filed pursuant to Fl. Rule Crim. Proc. 3.851 and related constitutional provisions) came in the form of a series of DNA test results that (1) revealed that a single, unidentified male was the source of DNA recovered both on semen found on the underwear of the homicide victim (whose nude, decomposed body was found in the trunk of her car) and on saliva found on a wash cloth in the back seat of the victim's vehicle; and (2) directly contradicted expert serology testimony presented by the State at Hildwin's original trial that he was among just 11% of the population that could have contributed those semen and saliva stains.

Although Petitioner lost his bid for relief by the narrowest possible (4-3) margin, all members of the Court concurred that the post-conviction DNA test results provided important new evidence worthy of serious consideration. *See Hildwin v. State,* 951 So.2d 784, 789 (Fla. 2006) (finding that the "newly discovered DNA evidence . . . refutes the trial serology evidence [and] is a significant new fact which must be evaluated in determining whether Hildwin is entitled to a new trial"); *see also id.* at 794-97 (Pariente, Anstead, and Quince, J.J., dissenting) (arguing that the new DNA evidence casts substantial doubt on Hildwin's guilt, and provides at least

three independent grounds that warrant relief from his conviction and death sentence).

Prior to rendering that decision, this Court also pressed the State to explain what efforts it had made to affirmatively *identify* the source of the unknown male DNA from the crime scene that formed the basis of Petitioner's claim for relief. In particular, at the conclusion of oral argument in December 2005, then-Chief Justice Pariente asked Assistant Attorney General Kenneth Nunnelley to respond to Petitioner's claim that the State had unreasonably refused to conduct a simple comparison of the unknown profile in this case against the national convicted-offender DNA database ("CODIS"), and that its failure to do so bordered on a bad-faith attempt to prevent Petitioner from accessing still further evidence to support his claim of actual innocence (for example, by identifying a serial rapist or murderer in CODIS as the source of the DNA profile here). In response, the State assured the Court that it had engaged in no such obstructionism, asserting that it was precluded from conducting the requested CODIS search at that time because the profile was "ineligible" for entry. The State placed the blame for this purported ineligibility squarely at Petitioner's feet, asserting that "we wound up with an ineligible profile at Mr. Hildwin's insistence," by virtue of the fact that Petitioner's counsel had elected to conduct testing at a private DNA

laboratory, whose results the FDLE could not upload into CODIS. *See Hildwin v. State,* Video Transcript of Oral Argument, Case No. 0401264, Dec. 2, 2005, at 45:22 through 46:18, available at http://wfsu.org/gavel2gavel/archives/05-12.html. Taking the State at its word, Justice Pariente nonetheless asked for the State's specific assurance that – were the technical barrier cited by its counsel not present – the State's own "exercise of its truth-seeking function" would lead to the requested CODIS search. The State's response was an unequivocal "yes." *See id.* at 46:10 ("Your Honor, had this profile been eligible for submission to CODIS, it would have long ago been submitted.")

Five years later, the State's claimed barrier to entry of the DNA profile in question has been removed. In 2008, the private DNA laboratory that conducted the testing in Petitioner's case became an "approved vendor" of the FDLE – a change of status that now permits the FDLE to directly enter the lab's results into the CODIS database. The State does not dispute this change of status. Yet in direct contradiction to its earlier representations to this Court, the State has not only failed to conduct the requested CODIS comparison on its own initiative, but has gone to enormous lengths over the last two years to obstruct Petitioner's efforts to have it done. This has included, *inter alia*, (1) boldly asserting that no court – state or federal – has the authority to order a CODIS search

over the State's objection, even where (as here) there is no dispute that CODIS has the scientific potential to establish a capital defendant's actual innocence; (2) steadfastly opposing Petitioner's request to have the FDLE appointed to review and upload the data from the private-laboratory testing; and (3) refusing even to provide Petitioner with documents pertaining to CODIS's basic eligibility requirements, so that his counsel may evaluate and respond to any new objections by the State.

Petitioner has spent years wading through the thicket of the State's recalcitrance to what should be a simple, ministerial act. In the meantime, he languishes on death row, undergoing treatment for advanced-stage lymphoma, while the State refuses to even set the wheels in motion for a one-time search of a computerized database that could be completed in a matter of hours, and establish beyond any doubt that a previously-unidentified third party actually committed the heinous crimes for which Petitioner has been sentenced to die. While Petitioner recognizes that this Court's all-writs jurisdiction is infrequently invoked, the lack of any other established procedural vehicle to obtain the requested relief – combined with the unquestionably vital interests in prompt vindication of a prisoner who may be factually innocent, and the public's interest in identifying and bringing potential serial offenders to justice – warrants this Court's intervention.

Moreover, Petitioner has faced such unwavering State resistance to the requested relief at a time when many prosecutors elsewhere in Florida regularly initiate and/or consent to CODIS searches under nearly identical circumstances – a state of affairs that raises grave concerns about capital defendants' ability to access exculpatory evidence, and goes to the heart of this Court's jurisdiction as the ultimate arbiter of fairness and equity in the administration of capital cases.

II. JURISDICTION

Art. V, §3 (b)(7) of the Florida Constitution provides this Court with the authority to issue "all writs necessary to complete the exercise of its jurisdiction." This Court is vested with exclusive appellate jurisdiction over all capital cases in this State, which specifically includes "exclusive jurisdiction to review all types of collateral proceedings in death penalty cases." *Orange County v. Williams*, 702 So.2d 1245 (Fla. 1997); Fl. Const. Art. V, §3(b)(1).

Petitioner presently has pending before this Court (and is contemporaneously filing herewith) an appeal pertaining to a collateral challenge to his 1996 death sentence under Fl. Rule Crim. Proc. 3.851. In that action, he asserts, *inter alia*, that his death sentence is unconstitutional because carrying out his execution despite the considerable evidence supporting his claim

of factual innocence (including, but not limited to, the present exclusionary DNA test results) violates the heightened reliability requirement in capital cases as mandated by the Eighth and Fourteenth Amendments to the United States Constitution and corresponding provisions of the Florida Constitution.

Furthermore, this Court has affirmed that a corollary of its exclusive appellate jurisdiction over capital cases is its obligation to ensure the fair and equitable administration of justice in all cases where a death sentence is imposed. *See, e.g., Arbelaez v. Butterworth,* 738 So.2d 326, 326 (Fla. 1999) (Court has "a responsibility to ensure the death penalty is administered in a fair, consistent, and reliable manner"); *Tillman v. State*, 591 So.2d 167, 169 (Fla. 1991); *Wilson v. Wainright,* 474 So. 2d 1162, 1165 (Fla. 1985). As discussed further *infra,* the present state of the law has resulted in grossly arbitrary and unequal access by capital defendants to the potentially conclusive evidence of their actual innocence that may be contained in the CODIS database. As such, it implicates this Court's longstanding jurisdictional mandate to issue such writs as may be required to ensure fundamental fairness in the administration of capital punishment, whether on a systemic or case-by-case basis.

III. FACTUAL AND PROCEDURAL BACKGROUND

A. Post-Conviction DNA Testing and the DNA Database System

In the nearly twenty-five years since Petitioner's 1986 trial, forensic DNA testing has revolutionized the nation's criminal justice system. DNA has been aptly characterized by the nation's former top prosecutor as "nothing less than the 'truth machine' of law enforcement, ensuring justice by identifying the guilty and exonerating the innocent."[1] And this embrace by the justice system has been as rapid as it has been widespread. Indeed, it took less than a decade for DNA typing to evolve from a novel scientific test, requiring twelve weeks of *Frye* hearings to determine its admissibility, *see, e.g., People v. Castro,* 545 N.Y.S.2d 985 (Sup. Ct. 1989), into "the foremost forensic technique for identifying perpetrators, and eliminating suspects, when biological material such as saliva, skin, blood, hair or semen are left at a crime scene." U.S. Dept. of Justice, POSTCONVICTION DNA TESTING: RECOMMENDATIONS FOR HANDLING REQUESTS 1 (1999).

No application of forensic DNA evidence has received greater attention – or wrought greater changes to the legal system – than its ability to conclusively establish the

[1] Statement of (former) Attorney Gen. John Ashcroft, President's DNA Initiative, March 2, 2001 (available at www.usdoj.gov).

innocence of convicted persons in prison and on death row. While individual cases of wrongful conviction were documented long before the advent of DNA analysis, *see, e.g.,* Edwin Borchard, CONVICTING THE INNOCENT (1932), never before has our nation witnessed so many convicted prisoners freed, in such a short time, with so little debate as to their actual innocence. Since 1989, when the first convicted felon in the United States was cleared by DNA, such testing has exonerated at least 254 wrongfully convicted men and women, 17 of whom had been sentenced to death. Twelve of these cases occurred in Florida, making this State fourth in the nation (behind only Texas, New York, and Illinois) in the greatest number of prisoners cleared by forensic DNA evidence to date.[2]

Technological advances within the field of DNA analysis have played a critical role in accelerating the pace of these exonerations. As the U.S. Supreme Court recognized last year, today's advanced DNA analysis is simply "unparalleled" in its "ability to exonerate the wrongly convicted and to identify the

[2] *See* The Innocence Project, Know the Cases, available at www.innocenceproject.org/know; The Innocence Project, Exonerations by State, www.innocenceproject.org/news/StateView.php. The use of the term "exoneration" here is limited to those cases in which a conviction is vacated by a court based upon the exculpatory results of post-conviction DNA testing, and the defendant (a) is granted a full pardon based on actual innocence, (b) secures dismissal of the indictment, and/or (c) is acquitted at retrial.

guilty." *District Atty.'s Ofc. for the Third Jud. Dist. v. Osborne*, -- U.S. --, 129 S.Ct. 2308, 2312 (2009); *see also id.* at 2315 (discussing evolution of DNA testing methods). The nation's investment in DNA testing has reflected its outsize importance in furthering these goals: by 2006, for example, the federal government's annual appropriations to the states for DNA testing amounted to nearly ten times what was allocated for all other forensic disciplines combined. *See* Nathan James, Congressional Research Service, *An Overview and Funding History of Select Department of Justice Grant Programs* 11, 15 (2006).

In particular, the capabilities of DNA analysis increased exponentially with the rapid development of (and government investment in) the FBI's Combined DNA Index System ("CODIS"), beginning in the late 1990s. CODIS is a vast, computerized database that allows participating law enforcement agencies from all 50 states and the federal government to instantaneously compare what are known as "STR" (Short Tandem Repeat) DNA profiles from crime scenes against DNA samples collected from nearly 8 million convicted felony offenders nationwide. To date, these rapid, computerized CODIS searches have generated over 107,000 "hits" in both active and "cold case" investigations. *See* Federal Bureau of Investigation, *CODIS-NDIS Statistics*, available at http://www.fbi.gov/hq/lab/codis/clickmap.htm. Notably, Florida's

participation in CODIS facilitated the very first of the system's "cold hits," when a database search identified a Jacksonville man as the perpetrator of a series of three sexual assaults in Duval County, and six in Washington, D.C.[3]

In addition to participating in CODIS, Florida has also made a substantial investment in its own databank of offender and crime scene DNA profiles. Although the federal CODIS system only permits the entry of DNA profiles from prisoners convicted of felonies, the Florida Department of Law Enforcement has been authorized by the Legislature to collect and maintain a separate database of its own. The state database includes both convicted felony offenders and an array of additional convicts and suspects – which now includes, pursuant to a substantial expansion last year, DNA profiles (1) *from all persons arrested on felony charges*, as well as (2) persons convicted of certain enumerated juvenile crimes, and (3) an expanded list of misdemeanor offenders. *See* Fl. Stat. Ann. § 943.325 (amended 2009).[4] As a result, "[s]ince the inception of the Florida

[3] *See* Metropolitan Police Dept., *Sexual Assaults Solved Through DNA Matching* (press release), July 22, 2009,*available at* http://newsroom.dc.gov/show.aspx/agency/mpdc/section/2/release/905/year/1999/month/7; U.S. Dep't of Justice, *Using DNA to Solve Cold Cases* 9 (2002).

[4] The different (but overlapping) geographic scope and eligibility requirements of the state and national databases means that a CODIS search will include some, but not all, of the profiles in the Florida database. Specifically, CODIS extends

convicted offender database, the number of known DNA samples gathered and entered into the system could be safely characterized as staggering." Florida Senate, Bill Analysis and Fiscal Impact Statement, SB 2276 (2009), at 3, *available at* http://tinyurl.com/fldatabase. State officials take great pride in the capabilities of this expanded database, noting that "Florida currently leads the nation in DNA matches, averaging more than 1,400 hits a month." Florida Dept. of Law Enforcement, FDLE Crime Laboratory Services: DNA Database (2009), *available at* http://tinyurl.com/fdledocs.

B. DNA Databases and Exculpatory Evidence

The development and expansion of CODIS and parallel state databanks over the last decade has also given criminal defendants a powerful new tool to prove the truth of their longstanding claims of actual innocence. Several courts upholding the constitutionality of the database have relied on this core function in holding that any threat to citizens' privacy is outweighed by the public interests served. *See, e.g., United States v. Amerson*, 483 F.3d 73, 87 (2d Cir. 2007) ("The greater accuracy and speed with which CODIS allows the

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to all convicted felons whose profiles are contained in the Florida state database; on the other hand, if one wishes to compare a DNA profile to those in the Florida system that do not satisfy the more stringent eligibility requirements of CODIS (arrestees, misdemeanants, and juveniles) a separate state database search must be performed.

government to apprehend and convict those guilty of crimes has, as we have seen, an equally important corollary -- its use in exonerating innocent people criminally suspected, convicted, or charged").

In 2010, the critical role that access to CODIS plays in an innocent prisoner's bid for post-conviction relief cannot be overstated. For where a CODIS search of an unidentified DNA profile from a case is performed, and "hits" to another convicted serial offender in the system with no connection to the defendant (particularly if the offender has a history of similar crimes, or confesses to the crime at issue when confronted with the results), it may erase all doubts about the exculpatory value of the earlier DNA results -- for example, by refuting an argument by the State that unidentified DNA was "stray" evidence unconnected to the crime, or may have come from a prior consensual partner of the victim. That such outcomes are neither surprising nor infrequent is grounded in common sense and experience. *See, e.g.,* United States Dep't of Justice, *DNA Initiative: Forensic DNA Databases* ("Given the recidivistic nature of many crimes a likelihood exists that the individual who committed the crime . . . was convicted of a similar crime and already has his or her DNA profile in a DNA database that can be searched by the [CODIS] software"), *available at* http://www.dna.gov/dna-databases/; Brandon L. Garrett, *DNA and*

Due Process, 78 Fordham L. Rev. – (2010) (forthcoming), at 10, *available at* http://law.fordham.edu/assets/LawReview/Garrett_Vol_78_May.pdf (noting that the pace of post-conviction DNA exonerations accelerated 'from a trickle. . . to a flood' with the advent of STR testing and CODIS in the late 1990s).

Indeed, fully sixty-five, or 26%, of the first 250 post-conviction DNA exonerations in the United States included a "cold hit" to the actual perpetrator of the crime in a state or federal DNA database. *See id.* n. 2931; *see also* Florida Senate Bill Analysis, SB 2276, *supra*, at 3 (noting that as of 2009, the Florida database system produces "an approximate 50 percent match rate – that is, about half the time, a known sample is linked to a forensic (unknown) sample"). Notably, many cases in this group involved defendants who had appeared unquestionably guilty in light of the evidence offered against them at trial (including multiple eyewitness identifications, detailed confessions to the crime, and various non-DNA forensics). *See, e.g.,* Brandon L. Garrett, *Judging Innocence,* 108 COLUM. L.REV. 55, 107 tbl. 8, 109 (2008) (surveying decisions issued in the first 200 post-conviction DNA exoneration cases, and finding that in nearly 50% of these cases, a court had commented on the innocent defendant's likely guilt, and in 10% of cases, had characterized the evidence of guilt as "overwhelming").

Notably, the dozens of DNA exonerations facilitated by CODIS over the last decade also include many cases in which -- as here -- the defendant had previously failed to obtain relief in a judicial proceeding based on the exclusionary DNA results alone. Darryl Hunt of North Carolina, for example, was convicted of rape and capital murder in 1984, when DNA testing was unavailable. As in Petitioner's case, the prosecution also argued at trial that Mr. Hunt was likely the source of semen and spermatozoa recovered at the crime scene. In the early 1990s, Mr. Hunt obtained an early-generation form of DNA testing on these items, and was excluded as the semen donor. Yet both the North Carolina Supreme Court (by a 4-3 vote) and the U.S. Court of Appeals for the Fourth Circuit denied him relief, citing, *inter alia*, the possibility that the DNA could have been deposited by an unidentified co-perpetrator. *See State v. Hunt*, 457 S.E.2d 276 (N.C. 1994); *Hunt v. McDade,* 205 F.3d 1333 (Table), 2000 WL 219755. at *3 (4th Cir. Feb. 25, 2000) (holding that "the new [DNA] evidence is simply not sufficiently exculpatory to warrant a new trial"). In 2003, however, the State searched an STR-DNA profile from the semen sample in the North Carolina state databank, which led them to a man named Williard Brown – who turned out to match the profile of the semen donor in Hunt's case, one shared by only 1 in 546 trillion black men. Brown subsequently admitted guilt and investigators

concluded that he had acted alone. After more than *10 years* of contested litigation over the significance of the earlier DNA test results, the positive identification of the true perpetrator through the DNA database led to a sea change in the State's position; Mr. Hunt was quickly freed from prison on the prosecution's own motion, and was thereafter granted a full "Pardon of Innocence" by the Governor. *See* Winston-Salem Journal, *The Case of Darryl Hunt* (archive of case documents), available at http://darrylhunt.journalnow.com/documents.html.

Other such examples abound. Ray Krone, a former postal worker in Arizona who in 2002 became the 100th individual exonerated from death row in the United States, was twice convicted in the 1990s of murdering a young female bartender after hours at his local tavern. The second jury found Krone guilty despite the fact that the victim was bitten all over her body, and DNA testing performed on saliva from her clothing excluded Krone as the source; the prosecution argued that this evidence did not necessarily exculpate Krone, as it could have been deposited by another tavern customer. But after a CODIS search of the unknown DNA profile identified a convicted sex offender as a source of the saliva, the State conceded that Krone did not commit the crime, and he was freed.[5] Similarly, in

[5] *See* Robert Nelson, "About Face," *Phoenix New Times,* Apr. 21, 2005; Rachel King, *Capital Consequences: Families of the*

2004, a CODIS hit exonerated and freed Entre Nax Karage, a Texas man convicted of the murder of his girlfriend. Although semen was found on the victim's vaginal swabs at autopsy and the DNA test results excluded Mr. Karage, the prosecution argued to the jury that the semen was likely from a consensual sex partner of the victim's, and that he had killed her in a rage after discovering the affair. When a court granted Mr. Karage's post-conviction motion to have the evidence re-tested and run through CODIS, however, it yielded a "hit" to an African American convicted rapist with no other connection to the victim (both she and Mr. Karage were Cambodian-American and lived in an insular immigrant community). The State then joined Mr. Karage's counsel in a motion to vacate his conviction, and he was pardoned on grounds of actual innocence.[6]

Of course, just as "DNA alone does not always resolve a case," *Osborne,* 129 S.Ct. at 2316, CODIS will not be a magic bullet in every instance. Even where the DNA evidence in question came from the true perpetrator of the crime, that

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Condemned Tell Their Stories 12-48 (2005); Flynn McRoberts, "Bite-mark verdict faces new scrutiny; Release of other Death Row inmate prompts Arizona to order DNA tests," *Chicago Tribune*, Nov. 29, 2004.

[6] *See* Mary Alice Robbins, *DNA Test and Lawyer's Tenacity Lead to Client's Exoneration*, TEXAS LAWYER, March 15, 2004, at 1; *Ex Parte Karage*, No. AP-75,253, 2005 Tex. App.WL 2374440 (Tex.Crim.App. Sep 28, 2005); *State v. Karage*, No. 04-98-00179-CR, 1999 Tex. App. WL 454638, at *1, 5, 6 (San Antonio, Jul. 7, 1999).

individual may have died or eluded apprehension on other offenses prior to the advent of the database; and even where a "hit" to another offender results, further investigation may be required to determine the exact role, if any, that this individual played in the offense and to ensure that the convicted defendant was not a co-perpetrator. But it cannot be denied that state and federal DNA databases are invaluable – and truly unprecedented – investigative tools in any case where, as here, post-conviction DNA testing has yielded an unidentified DNA profile.

C. Petitioner's Efforts to Obtain a DNA Database Search

1. The Private-Laboratory Impediment

Against this backdrop of CODIS's ever-growing capabilities to exonerate the wrongfully convicted, Petitioner began seeking to have the exclusionary profile in his case searched in the database over six years ago. In 2004, his former counsel recruited the assistance of undersigned co-counsel from the Innocence Project ("IP") while preparing Petitioner's appeal from the denial of his Rule 3.850 motion for post-conviction relief. Realizing that the exclusionary DNA results that formed the basis of the 3.850 petition contained a full DNA profile from an unknown semen and saliva donor, of the sort routinely searched in CODIS by law enforcement officials nationwide, the

IP contacted counsel for the State to inquire whether the profile had yet been uploaded, and if not, to request that it be done. *See* Appx. Tab A (composite) (letter dated 1/4/05).

The State responded with a flat assertion that the requested CODIS search was "not available" because the DNA profile at issue was simply "not eligible" for comparison against the database; according to the State, this ineligibility was the direct result of Petitioner's earlier request to have the DNA testing performed by Orchid Cellmark ("Cellmark"), a private DNA laboratory, rather than the FDLE. *See* Appx. Tab A (composite) (letter dated 1/19/05).

This "private lab ineligibility" claim was contradicted by the direct experience of Petitioner's Innocence Project counsel; indeed, counsel had worked on many cases in which cooperating law enforcement officials had entered DNA results from this private laboratory and others into CODIS. Several attempts to resolve the State's objection proved unavailing, even after counsel provided the State with documents from Cellmark establishing that the lab (1) possessed the necessary accreditations, (2) had a documented history of approved CODIS uploads by other state crime laboratories, and (3) was willing to make its facilities and records available should the FDLE have any questions about the lab's eligibility to have its results searched in CODIS in the instant case. *See* Appx. Tab A

(composite)(letter dated 5/24/05 and supporting exhibits). Ultimately, the State took the position that the fact that the FDLE did not, at that time, have a standing contract with the Cellmark created substantial technical and procedural hurdles to uploading the profile – hurdles that it was apparently either unable or unwilling to ask the FDLE to try and surmount. *See* Appx. Tab A (composite) (letter dated 1/27/05).

That same year, Petitioner's case reached this Court on appeal from the denial of his Rule 3.851 petition. Petitioner (through his *amicus* at the Innocence Project, who appeared jointly at oral argument with Petitioner's former CCRC counsel) argued that the State's failure to so much as ask the FDLE to review Cellmark's DNA testing data and standard operating procedures as an alternative route to secure CODIS entry – as officials from other states had done in the past – was a troubling indication that the State may not be acting in good faith with respect to the new, exclusionary DNA evidence. At oral argument, when asked by the Chief Justice to respond to these contentions, counsel for the State characterized as "absolutely false" the notion that any route existed through which Cellmark's test results could be deemed eligible for CODIS entry at that time. Directing the Court to a letter he had received from the FDLE regarding Cellmark's laboratory status, the State told the Court that Petitioner's own choice of

laboratory was responsible for this apparent CODIS ineligibility. *See* http://wfsu.org/gavel2gavel/archives/05-12.html at 46:18 ("we wound up with an ineligible profile at the defendant's insistence"). Were it not for this fact, counsel for the State assured the Court, "the profile would have been uploaded long ago." *Id.*

On December 14, 2006, a 4-3 majority of this Court affirmed the circuit court's determination that the newly-discovered DNA evidence, standing alone, did not entitle Petitioner to relief from his conviction pursuant to the test of *Jones v. State*, 709 So. 2d 512 (Fla. 1998), and its progeny. *Hildwin,* 951 So.2d 784 (Fla. 2006); c*f. id.* at 795-96 (Pariente, J., dissenting) (arguing that DNA tests revealing a third-party male DNA profile on the victim's underwear and wash rag "would have profoundly affected jury deliberations" and likely resulted in acquittal).

2. Change in Laboratory Status – and in the State's Position

Petitioner filed his federal *habeas corpus* petition on December 14, 2007. The petition was immediately stayed to permit Petitioner to return to state court to exhaust certain claims pertaining to his 1996 resentencing proceeding.

In July 2008, while those proceedings were pending, Petitioner's Innocence Project co-counsel learned that, due to a recent change in the FDLE's relationship with the Cellmark

laboratory, profiles obtained through private testing at Cellmark were now eligible for CODIS entry and being uploaded in post-conviction and other cases upon request. *See* Appx. Tab B (Motion to Lift Abeyance and Declaration of Nina Morrison in Support of Motion, 4/3/09, at Decl. ¶¶ 8-11, 19).

On August 18, 2008, members of Petitioner's legal team held a telephone conference with James Martin, FDLE General Counsel (whose letter regarding barriers to CODIS entry of a Cellmark profile was presented to this Court in 2005). Mr. Martin informed counsel that Cellmark's status had, in fact, recently changed, and that Cellmark was now an officially "approved vendor" of the FDLE. According to Mr. Martin, this change of status meant that the burdensome audit procedures and other potential barriers to CODIS entry of the profile in Petitioner's case based on Cellmark's private-laboratory status (previously outlined in his letter to counsel for the State in 2005) were not at issue any longer. *See id.* (Morrison Decl., Appx. Tab B) at ¶¶ 7-11.

Mr. Martin further informed counsel that, because the FDLE had not conducted the testing in this case, CODIS regulations required FDLE laboratory personnel to review and confirm the validity of Cellmark's DNA testing data regarding the profile reported before it could be searched in CODIS. He further stated that, in his view, the FDLE was not authorized to review

laboratory data or conduct a CODIS search on behalf of an individual defendant absent a court order to that effect. He confirmed, however, that were the FDLE to receive an order from a court directing it to do so in Petitioner's case, the agency would certainly comply with such an order, and further confirmed that Cellmark's private laboratory status would no longer be a barrier to such compliance. *Id*.

Relying on the State's earlier representation that it would embrace a CODIS search as part of its "truth-seeking" obligations in this case were the private-laboratory barrier not an issue, Petitioner filed his motion to obtain the court order requested by the FDLE (filing it in the federal district court, which, at that time, had retained jurisdiction over the guilt-phase claims in Petitioner's case to which the DNA evidence primarily relates). *See* Motion to Lift Abeyance, Appx. Tab B. In his Motion, Petitioner set forth the new information received from FDLE counsel regarding Cellmark's "approved vendor" status, as well as the FDLE's opinion that a court order pertaining to this defendant-initiated search was required before it could be carried out. The Motion further noted that there appeared to be at least two legal routes through which the Court had the discretion to issue such an order: first, under Rule 6(a) of the Federal Rules Governing §2254 Cases, which permits discovery in furtherance of a Petitioner's federal habeas corpus claims for

"good cause"; and second, under Fl. Stat. § 943.33, which permits, also upon a showing of good cause, any "court with jurisdiction" in a criminal case to appoint the FDLE to provide "laboratory services" to a defendant upon request. *Id.* at ¶¶4-5.

And while there has never been a dispute as to the enormous exculpatory potential of a CODIS search here, the Motion proceeded to outline for the court (which was unfamiliar with the facts of the underlying offense) the two routes through which the successful results of such a search could satisfy any good-cause or materiality requirement in Petitioner's case. First and foremost, Petitioner noted that the search could conclusively establish his actual innocence of the instant offense by resulting in a "hit" to a previously-unidentified third-party offender in the database – particularly if that individual has a history of committing crimes with a similar *modus operandi*, and/or who confesses to the crime for which Petitioner is incarcerated, a result that has come to pass in numerous post-conviction DNA cases nationally. *See id.* at 6-7. Second, he noted that the search could reveal that the source of the semen and saliva evidence from the crime scene was the victim's estranged boyfriend, William Haverty, who is presently incarcerated after numerous convictions for felony sexual

assaults against young children,[7] whose profile is in CODIS, and against whom an array of troubling inculpatory evidence already exists. *See id.; see also Hildwin,* 951 So.2d at 795-96 (Pariente, J., dissenting) (summarizing evidence developed pre- and post-trial pointing to Haverty as alternate murder suspect).[8]

The State did not, however, consent to the *pro forma* order facilitating a CODIS search that Petitioner sought. Instead, it hastily retreated from its earlier representations to this Court, notwithstanding the fact that profiles obtained by Cellmark were now eligible for upload – and, in fact, being

[7] As his DOC record indicates, between 1990 and 1997, Haverty was convicted of five separate counts of attempted sexual battery against children under the age of twelve, and three counts of coercing children into sexual acts. *See* http://tinyurl.com/fldochaverty.

[8] If the state's expert properly conducted the pretrial serology analysis, Haverty cannot be the source of the semen and saliva in question. This is because, according to the state's serologist, these fluids came from a "non-secretor" (a person whose semen and saliva do not reveal detectible traces of their ABO blood group antigens), whereas Haverty is a secretor. *See* 951 So.2d at 796 (Pariente, J., dissenting) (noting serology testimony). However, as FDLE counsel Martin confirmed with undersigned counsel, occasional errors in serology analysis and interpretation from the 1970s and 1980s caution that the results be re-tested with DNA to determine the validity of any such exclusion. In Petitioner's case, for example, it may have been that the exposure of these items to the elements (which were in the victim's vehicle for up to four days in the hot August sun before they were recovered) is the reason why no ABO antigens were detected on these items, rather than because they came from a non-secretor. On the other hand, it may well be that the state's expert was correct, in which case the need to determine whether this unidentified, third-party male DNA donor is a serial offender in CODIS remains imperative.

uploaded – by the FDLE. Instead, the State filed a dizzying array of objections to Petitioner's Motion. In its initial Response and a supplemental brief, the State asserted, *inter alia*, (1) that the federal court had no authority to order the requested action, because *even if a CODIS search yielded conclusive proof of Petitioner's factual innocence,* it "will not entitle [him] to relief" from his conviction or death sentence;[9]

[9] *See* Tab D (State's Response) at 5 ("[r]egardless of what a CODIS submission might show, it will not entitle Hildwin to relief") and 4-5 (arguing that "actual innocence" is not a "constitutional claim," and thus no discovery pertaining to his innocence claim should issue). But the State's claims as to this area of law – which it supports with a single, out-of-context fragment taken from the Supreme Court's decision in *Herrera v. Collins*, 506 U.S. 390 (1993) – are wholly incorrect. For while the *Herrera* court did reject (as insufficiently persuasive on its facts) the actual innocence claim brought by the petitioner in that case, Justice Rhenquist's majority opinion expressly presumed without deciding that "a truly persuasive demonstration of actual innocence made after trial *would render the execution of a defendant unconstitutional.*" 506 U.S. at 417 (emphasis supplied). Six other Justices in *Herrera* went further, asserting that, in their view, truly persuasive "freestanding" innocence claims by federal habeas petitioners are cognizable. *See id.*, 506 U.S. at 419-20 (O'Connor and Kennedy, J.J., concurring); *id.* at 430 (White, J., concurring in the judgment); *id.* at 430-31 (Blackmun, Stevens, and Souter, J.J., dissenting). The State's dismissal of "actual innocence" as a constitutionally-mandated basis for relief here also ignores the Court's repeated post-*Herrera* indications to the contrary. *See, e.g., House v. Bell,* 547 U.S. 518 (2006) (observing that "[i]n *Herrera . . .* [this] Court assumed without deciding that in a capital case a truly persuasive demonstration of 'actual innocence' made after trial would render the execution of a defendant unconstitutional, and warrant federal habeas relief if there were no state avenue open to process such a claim"); *Schlup v. Delo*, 513 U.S. 298, 324-25 (1995) ("The quintessential miscarriage of justice is the execution of a person who is actually innocent"); *see also In re Davis,* 130

(2) that Petitioner's "claim" for relief was barred by the Anti-Terrorism and Effective Death Penalty Act ("AEDPA") because (even though the change in laboratory status that served as the basis for the Motion occurred over a year after this Court had disposed of his DNA-based petition for relief), Petitioner had failed to exhaust it in state court; and (3) that no court, state or federal, had the authority to order the FDLE to order an unidentified forensic DNA profile be compared to CODIS where, as here, the State opposed such a search. *See* Appx. Tab D (Response to Motion to Lift Abeyance, dated 4/13/09), at 3-5, 7-8, 16-17; Appx. Tab E (Response to Memorandum Regarding State Court Jurisdiction, dated 5/28/09) at 2-4. Notably, nowhere in

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S.Ct. 1 (Mem.)(2009) (acting on capital defendant's original petition for a writ of habeas corpus to direct the district court to make specific findings as to whether new evidence "clearly establishes [the] petitioner's innocence"); *id.* at *1-*2 (Stevens, J., concurring) (noting that "decisions of this Court clearly support the proposition that it 'would be an atrocious violation of our Constitution and the principles upon which it is based' to execute an innocent person") (internal citation omitted). And it is fortunate indeed that the State is wrong about this body of law. For the logical implications of its position are disturbing indeed: *even if a CODIS search were to yield the most persuasive evidence of Petitioner's innocence imaginable*, according to the State, there would still be no constitutional barrier to carrying out his death sentence. That the State invokes it as a means of preventing Petitioner from accessing a procedure that seeks only to *discover* such new evidence in the first instance (and thus has no basis to argue that the new, as-yet-unknown evidence is insufficiently probative of his innocence to warrant relief) is equally troubling.

its briefing did the State deny that the private laboratory "ineligibility" it previously offered to this Court as the justification for its earlier failure to upload the profile was now moot; nor did it identify a single remaining obstacle, under either CODIS or FDLE regulations, to entering the profile into CODIS at this time.[10]

The court scheduled a hearing on the Motion for July 7, 2009. In advance of the hearing, counsel for Petitioner asked the State to clarify whether it intended to assert any technical (as opposed to legal) objections to the requested CODIS search, and if so, to provide a copy of the relevant CODIS regulations (which, per FBI policy, are not available to the public) in advance of the hearing so that he might endeavor to resolve and/or respond to those objections. The State flatly refused to do either. *See* Appx. Tab F (June, 2009 correspondence). Petitioner proceeded to ask the district court to issue an order for production of the applicable records in advance of the

[10] The State did make a generalized assertion that the status of the DNA laboratory "is not the sole criteria for CODIS entry and is not the sole impediment to submission of the DNA profile for analysis here." Tab E at 16. Notably, however, it failed to specify what these new "impediments" may be, and whether they are intractable or simply require some expenditure of time by the FDLE to resolve. Nor did the State explain how its belated assertion of further "impediments" to a CODIS search can be reconciled with its prior representation to the Chief Justice of this Court that, but for Petitioner's "insistence" on having a private DNA laboratory test an otherwise-eligible evidentiary sample from the crime scene, the requested CODIS search would have been conducted "long ago."

hearing so that he might address the State's newly-minted objections. The court denied the request, instructing petitioner to make further efforts under other available vehicles to obtain any documentation he might need to respond to the State's opposition, and suspended the hearing until Petitioner had the necessary material in hand. *See* Appx. Tab. G (Order dated 6/29/09).

On July 27, 2009, Petitioner withdrew his federal court motion, noting that since it appeared he would now need to return to state court in any event to compel the production of the applicable CODIS regulations, and since the State had raised a series of legal objections to the requested CODIS search that implicated the voluminous state court record and federalism concerns, he had determined that the most efficient route to resolving the underlying dispute over his fundamental entitlement to that relief was to present it to the state courts in the first instance. *See* Appx. Tab. H (Status Report and Notice of Withdrawal).

This petition followed. Pursuant to Fla. Rule. App. Proc. 9.142 (a)(5), it is being filed contemporaneously with his initial brief on appeal from the lower court's denial of his Rule 3.851 motion for postconviction relief.

IV. ARGUMENT

A. BECAUSE A DATABASE SEARCH OF THE UNIDENTIFIED DNA PROFILE COLLECTED FROM THE SCENE OF THE CRIME FOR WHICH PETITIONER HAS BEEN SENTENCED TO DEATH HAS THE UNDISPUTED SCIENTIFIC POTENTIAL TO YIELD CONCLUSIVE PROOF OF HIS ACTUAL INNOCENCE, AN ORDER DIRECTING SUCH A SEARCH IS AN APPROPRIATE EXERCISE OF THIS COURT'S ALL-WRITS JURISDICTION

It is axiomatic that the government has an "overriding interest that justice shall be done" and that the prosecutor "is the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer." *United States* v. *Agurs*, 427 U.S. 97, 110-11 (1976). The State has refused to abide by these maxims in Petitioner's case. It has vigorously fought his efforts to secure a simple, one-time search of a DNA database that remains the State's exclusive custody and control, insisting that no legal avenue exists for him to compel such an act, despite the fact that (1) there is no dispute that the requested discovery has the scientific potential to yield conclusive proof of Petitioner's actual innocence, (2) the sole, technical barrier that the State previously informed this Court stood in the way of a search is no longer present, and (3) any search that exculpates Petitioner may also permit the State to apprehend and prosecute the individual who actually committed the crime.

As this Court's then-Chief Justice recognized when seeking the State's assurance in 2005 that it would further its own

"truth-seeking" obligation by readily conducting a CODIS search of any eligibile DNA profile in Petitioner's case, there is no question as to the enormously probative evidence that CODIS may produce when DNA from this very sort of biological evidence is submitted to the database. Less than three months ago, for example, the Palm Beach County Sheriff's Department announced that detectives had solved a 1984 homicide, after an unidentified male DNA profile obtained from the female victim's underwear that had been submitted to CODIS a decade ago finally yielded a "hit" to the source. That individual was revealed to be Todd Campbell – a former neighbor of the victim's who also lived a half-mile from where her body was found, and whose DNA had just recently been entered into CODIS after he committed an unrelated drug offense. The hit not only led to Campbell's arrest, but ended the cloud of suspicion that had surrounded the longtime prime suspect – the victim's boyfriend – for the previous 25 years. *See* Eliot Kleinberg, "Father Celebrates as Police Crack 25 Year Old Murder of Jupiter Woman," *Palm Beach Post*, Jan. 22, 2010. Nor is that case an aberration. For while the State has characterized the prospect of a CODIS hit in Petitioner's case as "mere speculation" and thus unworthy of even attempting, see Tab D at 5, in recent years, DNA from crime-scene semen and saliva stains have repeatedly been traced to the true perpetrators of crime – and in many case,

simultaneously exonerated a wrongfully convicted defendant against whom highly persuasive evidence of guilt had been offered at trial.[11]

Because the State unreasonably refuses to permit even a one-time database search in Petitioner's case that could wholly exculpate him of the crime for which he is presently sentenced to die, this Court's intervention is appropriate. That is so, first and foremost, to fulfill this Court's basic obligation to ensure that Petitioner's death sentence is carried out only if it is in fact the appropriate punishment for a crime he has actually committed. *See, e.g., Wilson v. Wainright,* 474 So.2d 1162, 1165 (Fla. 1985) ("[t]he propriety of the death penalty is in every case an issue requiring the closest scrutiny"); *Muhammad v. State,* 782 So.2d. 343, 370 (emphasizing "the need for reliability in the determination that death is the appropriate punishment in a specific case")(Fla. 1991) (citing *Woodson v. North Carolina,* 420 U.S. 280, 305 (1976); *see also*

[11] *See, e.g.,* "DNA Evidence Frees a La. Death Row Inmate," *Associated Press*, Aug. 98, 2004 (DNA profile on saliva from ski mask and linked to convicted murderer in CODIS led to release of Ryan Matthews from Louisiana's death row); Chris Kahn, "DNA Links Convicted Rapist to 22-year-old Murder Investigation," *Associated Press,* March 9, 2004 (DNA from stains on blanket at crime scene linked to convicted sex offender in database; former death row inmate Earl Washington pardoned in same case); Robert Hanley, "DNA Leads to Arrest in '68 Rape and Murder of Girl, 13," *The New York Times*, June 17, 2004 (interstate CODIS hit identified convicted sex offender as source of semen stain in homicide victim's underwear; prior to CODIS hit, case had been unsolved since 1968).

Durocher v. Singletary, 623 So.2d 482, 486 (Fla. 1993) (Barkett, C.J., specially concurring) ("The State has a responsibility to ensure that society's ultimate penalty is not imposed except in appropriate cases and that the sentence is not arbitrary or the result of a mistake"). It is also rooted in this Court's broader constitutional responsibility to oversee the fair administration of capital punishment in this State. Indeed, this Court has long recognized its authority to fulfill these twin imperatives – including where, as here, it acts to ensure full disclosure of all evidence in the State's possession that may exculpate a capital defendant. For "[i]f there is any category of cases where society has an interest in seeing that all available information is disclosed, it is obviously in those cases where the ultimate penalty has been imposed." *In re Amendment to Florida Rules of Criminal Procedure – Capital Postconviction Public Records Production*, 683 So. 2d 475, 477 (Fla. 1996)(Anstead, J., specially concurring).

Moreover, granting the writ Petitioner seeks would in no way burden the State. Although only participating government crime laboratories have direct access to the CODIS database, they may enter an eligible crime-scene profile from a private, accredited DNA laboratory into the database following a "technical review" of the test results – a process which simply requires the public lab to confirm that the reported DNA profile

is consistent with the underlying data and otherwise comply with governing standards.[12] According to officials at Cellmark, which holds numerous contracts with CODIS-participating laboratories for outsourced DNA testing, that process ordinarily takes 2-4 hours to conduct. There are then two routes through which a CODIS search of the profile can be performed. First, FDLE personnel may directly enter (*i.e.,* type) data from the 13 genetic markers ("loci") of the DNA profile at issue into the database, along with basic information to identify the submitting agency and case number in the event a future "hit" is generated. Once entered, the profile is then automatically searched in the database on a weekly basis, comparing it to (1) all profiles from the millions of convicted offenders and unsolved crimes that are contained in CODIS at the time of submission, and (2) any new profiles that may be added to the database in the weeks, months, and years that follow. *See Rivera v. Muller,* 596 F.Supp.2d 1163, 1166-67 (D.Ill. 2009)(summarizing CODIS operational procedures). In addition, CODIS regulations give participating laboratories broad discretion to take another, even less burdensome route to compare a forensic

[12] *See* Federal Bureau of Investigation, Quality Assurance Standards for Forensic DNA Testing Laboratories, at Section 2 (Definitions -Technical Review) and Rule 12.1 (Review), *available at http://www.fbi.gov/hq/lab/fsc/backissu/july2000/codis2b.htm#Review.*

profile to the database, known as a "manual keyboard search." Such a search involves a one-time comparison of an unidentified profile against all others contained in CODIS as of that date, but, absent further action, would not permanently upload the profile into the system for future automated comparisons. *See id.* at 1167-68.

A search of the Florida state database system (which includes many profiles already in CODIS, but also contains an expanded pool of thousands of convicts and arrestees in this State) would proceed in a similarly rapid fashion. Indeed, the processing of DNA profiles for entry into Florida's database has become so efficient that the FDLE now uploads at least 10,000 new DNA profiles to the database each month. *See* Florida Senate Bill Analysis, SB 2276, *supra*, at 3.

Clearly, then, whatever *de minimis* expenditure of state resources would be required to grant the writ – that is, to conduct a technical review of Cellmark's DNA testing data and manually add a single, additional DNA profile to the thousands that the FDLE uploads to the system each month – is easily outweighed by the compelling interests at stake in an accurate determination of a capital defendant's guilt or innocence. Petitioner's modest request also pales in comparison to the far more sweeping forms of relief that are ordinarily sought (and found cognizable) under this Court's all-writs jurisdiction.

See, e.g., In re Amendments to Fl. Rule Crim. Proc. 3.853(d)(1)(a), 857 So. 2d 190 (Fla. 2003)(upon filing of all-writs petition and petition for writ of mandamus, granting petitioners' request for a stay of Rule that would have allowed imminent destruction of DNA evidence statewide); *Arbelaez, supra,* 738 So. 2d at 326-27 (petition seeking moratorium on imposition of death penalty due to under-resourced capital defender system; petitions dismissed as moot after oral argument in light of reorganization and increased funding for CCRC offices); *Jones v. Butterworth,* 701 So. 2d 76 (Fla. 1997)(per curiam)(petition seeking stay of execution and declaration that Florida's use of electric chair to carry out executions violates Eighth Amendment; stay issued, but petition denied on merits after evidentiary hearing).

Thus, while it is unfortunate that the State's inexplicable resistance to Petitioner's simple request for a CODIS search requires him to seek this Court's intervention, granting the writ is surely an appropriate use of the authority that is conferred by Art. V, §3(b)(7). That the Constitution gives this Court such broad powers to act in furtherance of justice as the need arises no doubt speaks to its drafters' recognition that they could not contemplate (and thus, should not prospectively limit) all future measures that may be needed to complete the exercise of this Court's jurisdiction – a foresight proven

correct where, as here, the use of previously-unimaginable forensic technology can, with a few strokes of a computer keyboard, transform the legal and factual posture of a capital defendant's case.

B. THE STATE'S ARBITRARY REFUSAL TO PERMIT A CODIS SEARCH IN PETITIONER'S CASE, EVEN WHILE PROSECUTORS ELSEWHERE IN THIS STATE INITIATE OR CONSENT TO CODIS SEARCHES UNDER VIRTUALLY IDENTICAL CIRCUMSTANCES, RAISES GRAVE CONCERNS ABOUT FAIRNESS AND EQUITY IN THE ADMINISRATION OF CAPITAL PUNISHMENT THAT HAVE TRADITIONALLY BEEN SUFFICIENT TO INVOKE THIS COURT'S ALL-WRITS JURISDICTION

The requested relief is also an appropriate and necessary exercise of this Court's all-writs jurisdiction because Petitioner's failure to be granted a CODIS search to date can be traced to the inequities that necessarily result when access to critical discovery in capital cases is left to the unfettered discretion of individual state officials. Ensuring a level playing field in this regard – that is, equal access to potentially exculpatory evidence that may be contained in CODIS, whether or not the prosecutor assigned to a particular defendant's case considers it desirable to conduct such a search – falls squarely within this Court's long-recognized constitutional responsibility to ensure the "fair, consistent, and reliable" administration of the death penalty across the State. *Arbelaez,* 738 So.2d at 326.

As a preliminary matter, there can be no reasonable dispute that the forensic DNA evidence at issue in Petitioner's case – semen- and saliva-stained items that were not only collected by investigators from the vehicle where the victim's corpse was found, but which were then introduced into evidence by the State at Petitioner's trial -- is the sort that law enforcement officials can and do routinely search in CODIS. *See, e.g.,* Federal Bureau of Investigation, *CODIS*, at 1 ("CODIS generates investigative leads *in cases where biological evidence is recovered from the crime scene*") (emphasis supplied), *available at* http://www.fbi.gov/hq/lab/pdf/codisbrochure.pdf; U.S. Dep't of Justice, *Using DNA to Solve Cold Cases* 3 (2002) (CODIS "efficiently compare[s] a DNA profile generated from biological evidence left at a crime scene against convicted offender DNA profiles and forensic evidence from other cases"), Appx. Tab C; *id.* at 21 Ex. 4 (listing, in table of "common items of evidence" suitable for DNA testing and CODIS entry, "laundry" and other clothing from crime scene). And the fact that any DNA profile obtained from this evidence may also be entered into the Florida state database could not be more clearly expressed in the text of the authorizing statute. *See* Fl. Stat. Ann. § 943.325(a) and (c) (expressly authorizing all "crime scene samples" and all "samples lawfully obtained during a criminal investigation" for inclusion in state's DNA database).

Presently, however, the FDLE's decision whether or not to actually conduct a CODIS search of an otherwise-eligible forensic profile obtained through post-conviction DNA testing appears to depend on one additional variable: whether the State itself requests or desires the search. Three recent cases -- in which database searches were promptly conducted for that very reason -- are illustrative in their dramatic contrast to the barriers that Petitioner has faced.

In *State v. Cody Davis*, Case No. 06CF004031AMB (Fifteenth Judicial Circuit, Palm Beach County), for example, the defendant was convicted in 2006 of a robbery that occurred at a local bar. Although a ski mask was recovered from outside the bar and collected by investigators, the eyewitnesses who identified Davis as the robber testified that the perpetrator did not wear a mask. The State submitted the mask for DNA testing, but did not consider the evidence central to its case, and proceeded to trial (and convicted Davis) before the tests were completed. When the results were obtained several months later and excluded Davis as the source of DNA from the mask, prosecutors decided -- on their own initiative -- to ask that the profile be searched in CODIS to rule out the possibility that Davis had been wrongfully convicted. The Palm Beach County laboratory (a participating CODIS laboratory) uploaded the profile without delay – yielding a "hit" to another offender, Jeremy Prichard,

with a history of highly similar robbery convictions. Moreover, when prosecutors pulled Prichard's photograph, they discovered that he had a tattoo similar to one described by eyewitnesses in the Davis case. When interviewed by detectives, Prichard confessed to the robbery for which Davis had been convicted, and admitted that he had committed the crime alone. Within days, the Palm Beach County State Attorney's Office successfully moved to vacate Mr. Davis's conviction and free him from custody.[13]

Similarly, in *State v. Holton* (Circuit Court Case No. 161987CF006409AXXXMA) (Fourth Judicial Circuit, Duval County), the FDLE promptly conducted a search of a DNA profile obtained by the Cellmark laboratory from a semen-stained blanket recovered from the scene of the rape for which Holton had been convicted two decades earlier -- but only after Duval County prosecutors filed a motion supporting the search. Holton, who was convicted of a two-perpetrator rape in 1987, when DNA testing was unavailable, obtained an order for post-conviction DNA testing on semen recovered from a blanket at the scene of the crime. When the results excluded Holton as the semen donor, his counsel asked the FDLE to search the profile in CODIS; the FDLE responded that it would require a court order to do so. As

[13] *See* Appx. Tab. B (Morrison Decl.) at ¶¶ 14-17 and Exh. B; George Bennett, "Absolved Prisoner Set Free," *Palm Beach Post*, March 11, 2007; Nancy L. Othon, "Man held four months until DNA evidence pointed to another suspect in robbery," *South Florida Sun-Sentinel*, March 10, 2007.

in Petitioner's case, at the time the CODIS search of the profile was sought, the State did not agree (and to date, still does not agree) that the exclusionary DNA results alone established Holton's innocence or even entitled him to a new trial; unlike in Petitioner's case, however, Duval County prosecutors did recognize the potential for CODIS to provide powerful new exculpatory evidence and further the state's parallel interest in identifying the true perpetrator(s) of the crime. The State itself thus petitioned the court for an order directing the search; and although no "hit" ultimately resulted, the FDLE promptly complied with the order, reviewed Cellmark's data, and entered the profile into CODIS the next month. *See* Appx. Tab. B (Morrison Decl.) at ¶¶ 15 and Exh. C.

Nor was *Holton* the first case in which Duval County prosecutors had facilitated a CODIS search of a profile obtained through post-conviction DNA testing – even when they were by no means certain that the DNA to be searched actually came from the perpetrator of the crime. In *State v. Heins*, Case No. 94-CF-3695 (Fourth Judicial Circuit, Duval Cty.), for example, the defendant was convicted in 1996 of the stabbing death of his sister-in-law. The jury convicted Heins despite the fact that pretrial DNA testing had revealed the presence of foreign hairs (from someone other than the victim, her husband, or the defendant) on her body, after prosecutors argued that they could

have been deposited by another source, long before the crime, on the mattress where her corpse was found. After conviction, the hairs and various other items of evidence were re-tested using the STR method of DNA analysis, and a CODIS-compatible DNA profile was obtained. Immediately after receiving the results, the State uploaded the profile into CODIS, recognizing that – although the State Attorney's trial position had been that the hairs were likely not related to the crime – a CODIS hit could show otherwise. *See* Office of the State Attorney, *Disposition Memorandum: State v. Heins,* December 4, 2007 (summarizing DNA testing and case background); FDLE DNA Testing Report dated August 12, 2005, at 4 (confirming entry of profile into CODIS), attached jointly at Appx. Tab I. Indeed, a CODIS search of the profile from this foreign pubic hair was conducted -- and the profile remains in CODIS to this day -- even though prosecutors were of the view that the unidentified DNA profile obtained post-conviction established only that the victim was in "intimate contact with another male" in a "context [that] remains unknown," and did not, in the State's view, "exonerate Chad Heins in any way or prove his innocence." SAO Disposition Memo, Tab I, *supra,* at 4, 5.

Fortunately, most prosecutors in this State and nationally act as their counterparts did in *Davis, Holton*, and *Heins,* and facilitate defendants' access to CODIS whenever it has the

potential to yield probative new evidence in a case. *See also, e.g.,* Jason Geary, "State Attorney Wants to Find the Real Rapist," *The Ledger*, Jan. 7, 2010 (reporting that prosecutors in Bartow, FL, had promptly submitted DNA profile to CODIS obtained from post-conviction DNA testing that led to release of convicted defendant James Bain; profile had been obtained from semen stain on rape victim's underwear). Presently, however, such cases can still receive markedly unequal treatment: on indistinguishable evidentiary "facts," a capital defendant convicted in Duval or Palm Beach County is likely to have an exclusionary DNA profile from the scene of the crime immediately searched in CODIS, while a defendant out of Hernando County may be shut out of access to the database entirely.

Fortunately, because most prosecutors facilitate, rather than obstruct, access to CODIS in the post-conviction context, court-ordered searches of the database are rare. But there is no question that one may be ordered over the objection of government officials where, as here, they are unwilling or unable to do so on their own; indeed, courts have issued such orders under an array of procedural vehicles available to them in a given case. *See, e.g., Rivera, supra,* 596 F.Supp.2d at 1173 (finding, under the federal Administrative Procedures Act, that FBI's refusal to conduct a keyboard search of DNA profile obtained from semen recovered from the homicide victim in

defendant Rivera's case was "arbitrary" and unlawful given the potential for CODIS to identify a third-party offender as the source of the DNA, and compelling the search); *State v. Fitzpatrick*, Case No. 97-482CFAES (Sixth Judicial Circuit, Pasco County, FL, Jan. 19, 2010) (finding that capital defendant was entitled to an order compelling a keyboard search of a foreign DNA profile under homicide victim's nails, for purpose of furthering pending claims in his initial Rule 3.851 petition for post-conviction relief) (attached as Appx. Tab J); *State v. Sagin*, Case No. MCR 5971 (Sup. Ct., Monterey County, CA, Jan 4,2010) (ordering, over state's objection, a search in CODIS of several foreign DNA profiles obtained through post-conviction DNA testing in homicide case)(attached as Appx. Tab K).[14]

V. CONCLUSION

The State of Florida has contended, for nearly twenty-five years, that Petitioner Paul Hildwin was solely responsible for

[14] Counsel has been informed by Sagin's defense team that, after the order compelling a CODIS search over the state's objection was issued in *Sagin*, the State of California informed the Court and the parties that it wished to conduct further investigation of its own into the source of the foreign DNA profiles (including, *inter alia*, conducting further DNA testing at the U.S. Department of Justice, and comparing the foreign DNA profiles to several individuals who were previously identified as potential suspects in the case). The parties thereafter agreed to stay the effect of the January 4, 2010 CODIS order to first give the State the opportunity to conduct this additional investigation and DNA analysis.

the brutal assault and murder of Vronzettie Cox, and that he should be put to death for that crime. But the State has never disputed that – no matter how fervent its own present belief in Petitioner's guilt – DNA technology could yield new, conclusive evidence of his actual innocence. It has never denied, for example, that a one-time search of the CODIS or Florida state DNA database could reveal that a serial offender with a history of abducting female victims in their vehicles and leaving their murdered corpses in the trunk was, in fact, the source of the semen and saliva found in Ms. Cox's vehicle here. Nor has the State ever denied that a database "hit" could yield a confession and guilty plea by the individual who is the actual source of the DNA on these items.

Neither these nor any other exculpatory scenarios will ever come to pass, however, if this Court does not mandate that Petitioner be given access to these databases in the first place. Five years after the State assured this Court that it would fulfill its "truth-seeking function" in this regard, it is apparently unwilling to honor that promise, and must be compelled to do so. Surely, there can be no better manifestation of this Court's longstanding commitment – and express constitutional mandate – to ensure the full and fair administration of justice in capital cases than to require that a death-sentenced prisoner be given access to readily-available

evidence in the State's possession that may wholly exculpate him.

WHEREFORE, Petitioner respectfully requests that this Court, pursuant to the exercise of its all-writs jurisdiction, issue a writ compelling the State of Florida, by and through the Florida Department of Law Enforcement, to upload the foreign DNA profile obtained from the evidence in this case into the CODIS and Florida State DNA Databases, or, in the alternative, to conduct a manual "keyboard search" of the profile in these databases, and provide him with a copy of the results of these searches.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was provided by first class U.S. mail this _____ day of June, 2010, to: Kenneth Nunnelley, Assistant Attorney General, 444 Seabreeze Boulevard, Fifth Floor, Daytona Beach, FL 32118.

_____
Martin J. McClain

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that in compliance with the font requirements of Fla. R. App. P. 9.210(a)(2), the font used in this brief is Courier New 12-point.

_____
Martin J. McClain